IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

O R D E R

S.B. CRIMINAL REVISION PETITION NO. 1202/2006

SUSHILA DEVI Vs. STATE OF RAJASTHAN

DATE: 08.03.2007.

HON'BLE MR. K.S. RATHORE, J.

Mr. M.I. Beg for the accused-petitioner.
Mr. Ashwini Kumar Sharma, PP for the State.

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R E P O R T A B L E

The present criminal revision petition under Section 397 r/w Section 401 Cr.P.C. is preferred by the accused-petitioner against the order dated 22.09.2006 passed by the District & Sessions Judge, Bundi, whereby he allowed the application under Section 439(2) Cr.P.C. filed by the State through Public Prosecutor and quashed and set-aside the bail order dated 14.06.2006 passed by the Chief Judicial Magistrate, Bundi and directed the trial Court to issue arrest warrant against the accused-petitioner in Criminal Case No. 416/2006 arising out of FIR No. 110/2006, registered at P.S. Kotwal, Bundi for the offences under Sections 420 and 406 IPC.

Brief facts of the case are that the accused-petitioner was arrested on 08.03.2006 during the course of investigation for the offence under Sections 420 and 406 IPC. On 08.06.2006 the petitioner moved an application under Section 167(2) Cr.P.C. before the Chief Judicial Magistrate, Bundi for bail and the same was allowed by the Court below on 14.06.2006. The bail was granted to the accused-petitioner on the ground that the prosecution has failed to submit the charge-sheet within the stipulated period. During trial the learned Public Prosecutor filed an application for cancellation of bail under Section 439(2) Cr.P.C. and the same was allowed vide order dated 22.09.2006 passed by the learned District & Sessions Judge, Bundi.

The said order dated 22.09.2006 passed by the District & Sessions Judge, Bundi is challenged by the petitioner in this revision petition on the ground that the petitioner was arrested on 08.03.2006 and the challan was required to be filed on or before 08.05.2006. Admittedly, the challan has been filed on 06.06.2006 i.e. beyond expiry of stipulated period, therefore, the application moved on behalf of the accused-petitioner under Section 167(2) Cr.P.C. has rightly been allowed by the Chief Judicial Magistrate,

Bundi vide its order dated 14.06.2006.

The petitioner has further challenged the impugned order on the ground that while cancelling the bail application exercising power under Section 439(2) Cr.P.C., the District & Sessions Judge has not mentioned the reasons on which the bail has been cancelled.

In support of his submissions, the learned counsel for the accused-petitioner has placed reliance on the judgment rendered by the Co-ordinate Bench of this Court in the case of **State Vs. Mangilal, reported in 2004(2) Cr.L.R.(Raj.) 1513,** wherein this Court while dealing with Section 167(2) Cr.P.C. has held as under:-

> "In the present case, the accused filed the bail application u/S. 167(2) Cr.P.C. on 18.10.1993. The application for bail dated 18.10.1993 was heard on 19.10.1993 and accused was granted bail on 20.10.1993. In the bail application moved by accused, it has been specifically mentioned that the period of 90 days has expired and challan has not been filed in the Court, therefore, he may be released on bail. The charge-sheet was also filed on 18.10.1993. Learned Special Judge has taken cognizance on 18.10.1993 but since accused was under custody upto 28.10.1993, no further remand was given on 18.10.1993. From perusal of the record, I find that there is no endorsement of the Public Prosecutor for submission of charge-

> sheet nor any time has been mentioned as to at what time the charge-sheet was filed. Even on 18.10.1993, copies of police papers were not supplied to the accused or his counsel. On the next date, on 19.10.1993 copies of police papers were supplied to the accused. Therefore, from perusal of record, it is not clear whether the charge-sheet was filed prior to filing of the bail application or not. The accused has exercised his right as no charge-sheet was filed before filing of the bail application as narrated by him in the bail application moved u/S. 167(2) Cr.P.C. In the meantime on the same day charge-sheet was also filed but the bail application was not heard by the Court and was heard on 19.10.1993 and the order was passed on 20.10.1993. Therefore, it cannot be said that the accused has not exercised his right before filing of the charge-sheet. Thus, the judgment cited by learned Public Prosecutor in case of Dr. Bipin Shantilal Panchal (1996 Cr.L.J. 1652) does not help him as facts of this case are altogether different. “

Learned counsel for the petitioner further placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of **Aslam Babalal Desai Vs. State of Maharashtra, reported in AIR 1993 Supreme Court 1,** wherein the Hon'ble Supreme Court has held that “Bail- Cancellation of- Bail granted for not completing investigation within prescribed time- Cancellation of- Can be for special reasons germane to

cancellation under Sections 437(5) and 439(2)- Cancellation on ground of subsequent filing of charge sheet- Not permissible."

On the contrary, learned Public Prosecutor appearing for the State contended that the application was moved on behalf of the State purely on the basis of statutory provisions as at the time of granting bail application invoking power under Section 167(2) Cr.P.C., has not rightly been appreciated, therefore, the application for cancellation of bail was moved, which has rightly been allowed and the bail which was granted to the petitioner under Section 167(2) Cr.P.C., has been cancelled by the District & Sessions Judge, Bundi vide its order dated 22.09.2006 invoking power under Section 439(2) Cr.P.C.

Further the learned Public Prosecutor submits that the petitioner was arrested on 08.03.2006 and the challan has been filed on 06.06.2006 and between arrest of the petitioner and filing of the challan, the petitioner has not moved any application under Section 167(2) Cr.P.C. and the same was moved on 08.06.2006 after filing of the challan. Thus, the benefit under Section 167(2) Cr.P.C. is not available to the petitioner and this aspect has not been considered by

the Chief Judicial Magistrate while granting bail as a rule vide its order dated 14.06.2006.

Learned Public Prosecutor also placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of **Uday Mohanlal Acharya Vs. State of Maharashtra, reported in (2001)5 SCC 453,** wherein the Hon'ble Supreme Court has held as under:-

> "Section 167 is in fact supplementary to Section 57, in consonance with the principle that the accused is entitled to demand that justice is not delayed. The object of requiring the accused to be produced before a Magistrate is to enable the Magistrate to see that remand is necessary and also to enable the accused to make a representation which he may wish to make. The power under Section 167 is given to detain a person in custody while the police goes on with the investigation and before the Magistrate starts the enquiry. Section 167, therefore, authorises the Magistrate to permit detention of an accused in custody and prescribes the maximum period for which such detention could be ordered. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.
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> Having prescribed the maximum period what would be the consequences thereafter has been

indicated in the proviso to sub-section (2) of Section 167. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and does furnish the bail as directed by the Magistrate. The proviso is unambiguous and clear and stipulates that the accused shall be released of bail if he is prepared to and does furnish the bail which has been termed by judicial pronouncement to be “compulsive bail” and such bail would be deemed to be a bail under Chapter 33. The proviso to sub-section (2) of Section 167 is a beneficial provision for curing the mischief of indefinitely prolonging the investigation and thereby affecting the liberty of a citizen.

Even though a Magistrate does not possess any jurisdiction to refuse the bail when no charge-sheet is filed after expiry of the period stipulated under the proviso to sub-section (2) of Section 167 and even though the accused may be prepared to furnish the bail required, but such furnishing of bail has to be in accordance with the order passed by the Magistrate. In other words, without an order of the Magistrate the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 cannot be given effect to. Necessarily, therefore, an order of the court has to be passed.

If, however, the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and

> the proviso to sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be authorised, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so called indefeasible right of the accused would stand extinguished."

I have heard learned counsel for the accused-petitioner, learned Public Prosecutor for the State and have also gone through the impugned order dated 22.09.2006 passed by the District & Sessions Judge, Bundi and carefully perused the judgments referred by the learned counsel for the petitioner as well as learned Public Prosecutor appearing for the State.

So far as cancellation of bail is concerned, the provisions of Section 167(2) Cr.P.C. have not been considered, which are reproduced hereunder:-

> **"167. Procedure when investigation cannot be completed in twenty-four hours.-**
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> (1) _ _ _ _
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> (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and

considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purpose of that Chapter;]

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

Upon careful perusal of the provisions of Section 167(2) Cr.P.C., the accused is having a right to move application if the prosecution is failed to submit the challan within the stipulated period and here in the instant case, the petitioner was arrested on 08.03.2006 and the challan was filed on 06.06.2006 and between this period the petitioner has not moved any application under Section 167(2) Cr.P.C. and to this effect I am not convinced with the submissions made by the learned counsel for the petitioner that the challan papers have not been given to the petitioner on 06.06.2006. Immediately after expiry of 60 days, the petitioner is at liberty to move application under Section 167(2) Cr.P.C. and he is entitled to get bail as a rule as provided in the statutes, but admittedly the accused-petitioner moved an application under Section 167(2) Cr.P.C. for bail on 08.06.2006 and by that time challan has been filed. The moment challan has been filed, right of the petitioner is extinguished in view of the ratio decided by the Hon'ble Supreme Court in the aforementioned case of **Uday Mohanlal Acharya (supra).**

The proviso to sub-section (2) of Section 167 is a beneficial provision for curing the mischief of

indefinitely prolonging the investigation and thereby affecting the liberty of a citizen. In such circumstances, the petitioner is required to be vigilant about his right immediately on default of the investigating agency and challan which has not been filed within the stipulated period, the accused is entitled to be released on bail and he should move application under Section 167 Cr.P.C.

Realising this fact that the trial Court has granted bail without appreciating the fact that the application under Section 167(2) Cr.P.C. has not been filed by the accused-petitioner prior to filing of the challan, the learned Public Prosecutor moved an application under Section 439(2) Cr.P.C. for cancellation of bail purely on the ground of non-compliance of the mandatory provisions and for that the District & Sessions Judge is not required to assign a reason for cancellation of bail as the cancellation application is not moved on the ground of misuse of bail but purely on the ground of statutory requirement of the relevant provisions of law.

In such circumstances, I am not convinced with the submissions made by the learned counsel for the accused-petitioner and the impugned bail cancellation

order dated 22.09.2006 passed by the District & Sessions Judge, Bundi requires no interference whatsoever by this Court.

Consequently, the revision petition fails and the same is hereby dismissed.

(K.S. RATHORE),J.

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